IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

DENISE SPEAKS	:	CIVIL ACTION
	:	
v.	:	
	:	
GOVERNMENT OF THE VIRGIN ISLANDS, et al.	:	NO. 2006-168

MEMORANDUM

Bartle, C.J. January 14, 2009

Plaintiff Denise Manigualt Speaks ("Speaks") instituted this employment discrimination action against her former employer, the Virgin Islands Housing Authority ("VIHA") and the Government of the Virgin Islands ("Government"). The complaint contains nine counts: (1) Count I for employment discrimination based on race, color and national origin, under Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e, *et seq.*; (2) Count II for employment discrimination based on race and national origin under the Virgin Islands Civil Rights Act, V.I. Code Ann. tit. 10, § 64; (3) Count IV for breach of contract; (4) Count V for breach of the covenant of good faith and fair dealing; (5) Count VI for slander per se and libel per se; (6) Count VII for defamation per se; (7) Count VIII for intentional infliction of emotional distress; (8) Count IX for negligent infliction of emotional distress; and (9) Count X for punitive damages.[1] Now

1. Plaintiff concedes that Count III for wrongful discharge (continued...)

pending before the court are: (1) the motion of the Government to dismiss under Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure; and (2) the motion of the VIHA to dismiss under Rule 12(b)(6).

I.

Under Rule 12(b)(6), a claim should be dismissed only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would warrant relief." Cal. Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) (citation omitted). The defendant bears the burden of showing that no claim has been stated. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222 (1991). All well-pleaded allegations in the complaint must be accepted as true, and all reasonable inferences are drawn in favor of the non-moving party. Id. The court may not assume the existence of facts that have not been pleaded. Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983); City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998). Though a plaintiff defending against a motion to dismiss under Rule 12(b)(6) "does not need detailed factual allegations, [his] obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

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1.(...continued)
under V.I. Code Ann. tit. 24, § 76 should be dismissed.

will not do." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007) (internal quotations and citations omitted).

In deciding a motion to dismiss, a court may consider "the allegations contained in the complaint, exhibits attached thereto, and matters of public record." Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 190 n.3 (3d Cir. 1999); Pension Benefit Guar. Corp. v. White Consol. Indus. Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). We also may take into account "document[s] integral to or explicitly relied upon in the complaint ... without converting the motion [to dismiss] into one for summary judgment." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) (emphasis removed) (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996)).

II.

For present purposes, we will consider the facts in the light most favorable to Speaks pursuant to Rule 12(b)(6).

Speaks was hired as in-house legal counsel for the VIHA on November 8, 2004. At the time, she was a resident of Pennsylvania and relocated to the Virgin Islands for the purposes of her employment. Speaks was not licensed to practice law in the Virgin Islands but expressed interest in taking the Virgin Islands bar examination, although it was not a requirement for her employment. While employed by the VIHA, she asserts she "experienced hostility in the workplace and was continuously reminded that she was not from the Virgin Islands and would not fit in." Pl.'s Compl. at ¶ 10. She contends that due to these

workplace hostilities she was unable to perform her duties adequately, and therefore notified the VIHA of the alleged hostile conduct. According to Speaks, she continued to be subject to a pattern and practice of harassment until mid-April, 2005. Speaks' employment with the VIHA was terminated on April 22, 2005, ostensibly because she was not admitted to practice law in the Virgin Islands.

III.

Defendants first contend that Speaks' claim for employment discrimination pursuant to Title VII must be dismissed because she failed to exhaust her administrative remedies. Under Title VII, a plaintiff must ordinarily file a charge of employment discrimination with the United States Equal Employment Opportunity Commission ("EEOC") prior to seeking relief on those claims in federal court. 42 U.S.C. §§ 2000e-5(b), (f); Hornsby v. U.S. Postal Service, 787 F.2d 87, 90 (3d Cir. 1986); Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997). The charge must be filed with the EEOC within 180 days of the alleged unemployment practice, or within 300 days if proceedings have already been instituted with a parallel territorial or local entity with authority to investigate complaints of discrimination. 42 U.S.C. § 2000e-5(e)(1); Bostic v. AT&T of V.I., 166 F. Supp. 2d 350, 356 (D.V.I. 2001) (citing Watson v. Eastman Kodak Co., 235 F.3d 851, 854 (3d Cir. 2000)). Speaks does not allege that she instituted proceedings with any such state or local agency, nor can we find any evidence of such a

filing in the present record. Thus, it is the 180 day period under 42 U.S.C. § 2000e-5(e)(1) that is applicable to her claims. This timeliness requirement is a non-jurisdictional prerequisite, and, as such, is "subject to waiver, estoppel and equitable tolling principles." Communc'ns Workers of Am. v. N.J. Dep't of Personnel, 282 F.3d 213, 217 (3d Cir. 2002) (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

Speaks admits that she was terminated on April 22, 2005 and that her EEOC charge, naming the VIHA only, was filed on April 6, 2006, some 348 days later. Clearly, this is well beyond the statutory period. 42 U.S.C. § 2000e-5(e)(1). Nor does Speaks provide the court with any reason why the statutory period should be tolled or waived. To the contrary, on the EEOC charge, Speaks listed April 22, 2005 as both the earliest and latest "Date(s) Discrimination Took Place," and did not check the box provided to indicate that the allegations referred to a "Continuing Action." Speaks' only argument as to the timeliness of her EEOC charge is that this court is prohibited from considering her actual EEOC filing at this stage of the litigation. She contends instead that we must simply credit the allegation in her complaint that she filed a charge of discrimination with the EEOC and obtained a right-to-sue letter. We disagree. The EEOC charge is a document "integral to or explicitly relied on" in Speaks' complaint. Burlington Coat, 114 F.3d at 1426; see also Bostic, 166 F. Supp. 2d at 354-55. Having

reviewed the date of the filing, it is clear that it is untimely. 42 U.S.C. § 2000e-5(e)(1).

Because she failed timely to file a charge with the EEOC, we hold that Count I of Speaks' complaint does not state a claim upon which relief may be granted and will dismiss that count under Rule 12(b)(6). Hornsby, 787 F.2d at 90.

The Government additionally contends that Count I should be dismissed against it because the EEOC charge filed by Speaks names only the VIHA and not the Government. As Speaks does not allege that the Government received notice and had a shared commonality of interest with the VIHA, we agree that this is a valid independent ground to dismiss Count I against the Government. Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh, Pa., 903 F.2d 243, 251-52 (3d Cir. 1990).

IV.

Defendants next argue that Count II of the complaint, which alleges a violation of § 64 of Chapter 5 of the Virgin Islands Civil Rights Act, must be dismissed. V.I. Code Ann. tit. 10, § 64. Chapter 5 provides for the creation of a Virgin Islands Civil Rights Commission ("Commission"). It gives the Commission jurisdiction to enforce all of the provisions of that Chapter, including to investigate alleged violations, hold hearings to determine whether a respondent has committed a violation, issue cease and desist orders against violators, and bring a civil suit on behalf of the complainant. V.I. Code Ann.

tit. 10, §§ 62, 63, 68, 71 & 73. Section 64 of the Act, on which Speaks relies, provides in pertinent part:

> 1) It shall be an unlawful discriminatory practice:
>
> > (a) For an employer, because of age, race, creed, color, national origin, place of birth, sex and/or political affiliation of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

The Government maintains that Speaks does not have standing to bring a claim under § 64, because only the Commission, and not a private party, may enforce this provision.

Although the statute itself is silent as to the availability of a private right of action under Chapter 5, our Court of Appeals has observed that "[i]t is ... certainly arguable that parties whose rights have been violated under § 64 of chapter 5 need not bring their claims in the first instance to the Commission, but may bring them directly to District Court." Figueroa v. Buccaneer Hotel Inc., 188 F.3d 172, 180 (3d Cir. 1999). Following the Figueroa decision, this court has issued a number of conflicting opinions regarding the question of whether it is proper to read Chapter 5 as creating a private right of action. E.g. Miller v. V.I. Hous. Auth., 2005 WL 1353395, (D.V.I. June 3, 2005), but see e.g. Frorup-Alie v. V.I. Hous. Fin. Auth., 2003 WL 23515136, (D.V.I. Oct. 26, 2003).

We find that the recent opinion of our Court of Appeals in Wisniewski v. Rodale, Inc. to be instructive in analyzing this question. 510 F.3d 294 (3d Cir. 2007). In Wisniewski, the court considered whether a private right of action could be implied under a particular provision of the Postal Reorganization Act, 39 U.S.C. § 3009. Id. In doing so, the court extensively surveyed Supreme Court precedent as to when a private right of action could be implied in an otherwise silent statute and set forth the most current framework to be used in considering that question:

> The judicial task is to interpret the statute [the legislature] has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Id. at 299-300 (quoting Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001). The Wisniewski court concluded that:

> After Sandoval, the relevant inquiry for determining whether a private right of action exists appears to have two steps: (1) Did [the legislature] intend to create a personal right?; and (2) Did [the legislature] intend to create a private remedy? Only if the answer to both of these questions is "yes" may a court hold that an implied private right of action exists under a federal statute.

Id. at 301 (citations omitted).

Thus, in determining whether a private right of action may be implied in Chapter 5 of the Virgin Islands Civil Rights Act, we consider whether the Virgin Islands Legislature intended

to create a personal right. In exploring this issue, we examine the "text and structure of the statute" to determine whether it contains "rights creating language that focuses on the individual protected rather than the person regulated." Id. at 301-02 (citing Sandoval, 532 U.S. at 288-899) (internal quotations omitted). Unlike the portion of the Postal Reorganization Act being considered in Wisniewski, which contained an explicit reference to a right, the language in § 64 refers only to the entity regulated, that is, the employer, and prohibits it from engaging in unlawful discrimination. Nor does Speaks identify any right which she believes was created by that section of the Civil Rights Act. Without any language in the text and structure of the statute to imply the creation of a personal right of action, we must conclude that it was not the intent of the Virgin Islands Legislature to do so. Because we have determined that there was no intent to create such a personal right, we need not reach the question of whether the Legislature intended to create a private remedy.

We will dismiss Count II of the complaint under the Virgin Islands Civil Rights Act for lack of standing.

V.

We now turn to Speaks' contract claims, Counts IV and V of the complaint. In Count IV, Speaks alleges that "Defendants breached the employment contract, both express and implied with Plaintiff." Pl.'s Compl. at ¶ 24. To state a claim for breach of contract under Virgin Islands law, a plaintiff must allege:

(1) the existence of a contract, including its essential terms; (2) the breach of a duty imposed by the contract; and (3) damages resulted from the breach. Pourzal v. Marriott Int'l, Inc., 2006 WL 2471834, *2 (D.V.I. Aug. 21, 2006) (citing Stallworth Timber Co. v. Triad Bldg. Supply, 968 F. Supp. 279, 282 (D.V.I. App. Div. 1997); Restatement (Second) of Contracts §§ 235, 237, 240[2]).

The only statements in Speaks' complaint that could be interpreted as referencing any sort of agreement between the parties are:

> 5. On or about November 8, 2004, Plaintiff accepted employment as Legal Counsel for Defendant.
>
> 6. At the time Plaintiff interviewed for the position of Legal Counsel, and at that time Defendant VIHA was aware that Plaintiff was not licensed to practice law in the U.S. Virgin Islands, which was not a prerequisite for Plaintiff to serve as in-house legal counsel.
>
> 7. During the interview process with VIHA, Plaintiff voluntarily expressed a personal interest in taking the V.I. Bar Examination, even though there was no requirement for her to do so as a condition of employment.
>
> 8. Based on the representations of Defendants, Plaintiff relocated to the U.S. Virgin Islands and commenced work as scheduled.

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2. Under the Virgin Islands Code, "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary." V.I. Code Ann. tit. 1, § 4.

> 9. In follow up communications with Plaintiff, Defendant VIHA confirmed its agreement to pay for any expenses incurred by Plaintiff in taking the V.I. Bar Exam.

Pl.'s Compl. at ¶¶ 5-9. Clearly, we cannot even infer from these statements the existence of a contract between Speaks and the Government, much less any duty owed by the Government to Speaks or any breach thereof, as the allegations refer only to the VIHA. Further, even assuming that these statements allege a contract between Speaks and the VIHA, Speaks did not include any of that contract's "essential terms." At most, Speaks alleges that the VIHA owed her a contractual duty to pay for any expenses she incurred in taking the Virgin Islands bar examination. She does not, however, allege that the VIHA breached this duty or that she suffered damages from any such breach. Accordingly, Count IV of Speaks' complaint for breach of contract will be dismissed.

In Count V of the complaint, Speaks contends that "Defendants' actions against Plaintiff resulted in a breach of the covenant of good faith and fair dealing." Pl.'s Compl. at ¶ 27. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). Under Virgin Islands law, to state a claim for breach of the implied duties of good faith and fair dealing, a plaintiff must allege: "(1) that a contract existed between the parties, and (2) that, in the performance or enforcement of the contract, the opposing party engaged in conduct that was fraudulent, deceitful, or otherwise

inconsistent with the purpose of the agreement or the reasonable expectations of the parties." LPP Mortgage Ltd. v. Prosper, 2008 WL 5272723, 2 (D.V.I. Dec. 17, 2008) (citing Restatement (Second) of Contracts § 205; other citations omitted). Again, Speaks has failed to allege the existence of a contract between her and the Government. Moreover, she does not allege that either defendant engaged in conduct that was "fraudulent, deceitful, or otherwise inconsistent with the purpose of the agreement or the reasonable expectations of the parties." Id. We will therefore dismiss Count V of the complaint for breach of the implied covenant of good faith and fair dealing.

VI.

We now consider Counts VI, VII, VIII and IX of Speaks' complaint, all of which are brought in tort. The causes of action asserted in these four counts are: slander per se, libel per se, defamation per se, intentional infliction of emotional distress and negligent infliction of emotional distress.

The Government contends that each of these tort claims should be dismissed as to it under Rule 12(b)(1) for lack of jurisdiction because Speaks has not complied with the Virgin Islands Tort Claims Act ("VITCA"). Under VITCA,

> a claim to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the Government of the Virgin Islands while acting as such officer or employee, shall be filed within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the

> claim shall be filed within two years after the accrual of such claim.

V.I. Code Ann. tit. 33, § 3409(c). Timely compliance with VITCA's notice requirement is a jurisdictional prerequisite to bringing suit on a plaintiff's tort claims. Delgado v. Gov't of V.I., 137 F. Supp. 2d 611, 615 (D.V.I. App. Div. 2001).

Speaks' tort claims accrued on April 22, 2005, the date of her termination. She first filed this lawsuit on December 15, 2006, nearly one year and nine months later, well beyond the ninety-day period permitted under the Act. Nor does Speaks allege in her complaint that she filed a notice of intent to file tort claims within that ninety-day period. In her opposition to the Government's motion to dismiss, however, Speaks asserts that she did file the appropriate notice and provides to the court a copy of the notice allegedly filed.[3] That notice, which is dated December 19, 2006, is plainly untimely under VITCA.[4] Thus, we

3. In considering the Government's jurisdictional attack on Speaks' tort claims under Rule 12(b)(1), we may consider evidence outside the pleadings. Gould Elecs. Inc. v. U.S., 220 F.3d 169, 176 (3d Cir. 2000) (citations omitted).

4. VITCA additionally allows a court, in its discretion, to waive the time limit provided in § 3409(c) if the plaintiff has applied for such permission by "motion based upon affidavits showing a reasonable excuse for the failure to file the notice of intention" and where the Government of the Virgin Islands had actual knowledge of the facts supporting the claim within the requisite time frame. V.I. Code Ann. tit. 33, § 3409(c). Speaks has made no such motion.

will dismiss Counts VI, VII, VIII, and IX of Speaks' complaint against the Government as untimely under Rule 12(b)(1).[5]

Having disposed of Speaks' tort claims against the Government, we turn to the VIHA's arguments that those claims be dismissed against it as well. The VIHA first contends that Speaks has not met the pleading requirements for the related torts of defamation per se, slander per se, and libel per se. To state a cause of action for defamation under Virgin Islands law, a plaintiff must plead facts which establish four basic elements:

> (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either the actionability of the statement irrespective of 'special harm' or the existence of 'special harm' caused by the publication.

VECC, Inc. v. Bank of Nova Scotia, 296 F. Supp. 2d 617, 622 (D.V.I. 2003) (citing Restatement (Second) of Torts § 558; other citations omitted). A defamatory statement is one that "tends [] to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559.

In the complaint, Speaks alleges that "[t]he actions of Defendants in publishing false information about the reasons for

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5. The Government additionally notes that the notice of intent to file tort claims is defective, as it does not name the Government, nor any of its employees. We need not reach this argument.

Plaintiff not being admitted to practice law in the U.S. Virgin Islands constituted defamation per se of Plaintiff's reputation, good name and character in the community." Pl.'s Compl. at ¶ 34. This conclusory allegation is inadequate to state a cause of action for defamation. Speaks fails to plead what the false information was. Twombly, 127 S. Ct. at 1964-65. Accordingly, Speaks' claim for defamation per se under Count VII of the complaint will be dismissed.

The elements of a claim for libel per se and slander per se are derived from those of defamation, with the exception that they do not require proof of special damages. Under Virgin Islands law, liability for libel per se attaches to "[o]ne who falsely publishes matter defamatory of another in such a manner as to make the publication a libel ... although no special harm results from the publication." Restatement (Second) of Torts § 569. One is liable for slander per se if he or she "publishes matter defamatory to another in such a manner as to make the publication a slander ... although no special harm results if the publication imputes to the other ... matter incompatible with his business, trade, profession or office." Id. at § 570. The primary difference between libel and slander is that libel is the "publication of defamatory matter by written or printed words" while slander is the "publication of defamatory matter by spoken words." Id. at § 568.

Speaks contends in the complaint that "The actions of Defendants in terminating Plaintiff's employment without due

process and depriving Plaintiff of the opportunity to clear her name, constituted slander per se and libel per se against Plaintiff." Pl.'s Compl. at ¶ 30. Denial of due process and of an opportunity to clear her name are simply not acts of libel or slander. We will accordingly dismiss Count VI of plaintiff's complaint against the VIHA.

The VIHA further argues that Speaks' allegations fail to give rise to a cause of action for intentional infliction of emotional distress, which is contained in Count VIII of the complaint. "The gravamen of the tort of intentional infliction of emotional distress is that the conduct complained of must be of an extreme or outrageous type." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) (citation and internal quotations omitted). Whether the defendant's conduct is so extreme or outrageous as to permit recovery is initially a matter to be decided by the court. Restatement (Second) of Torts § 46 cmt. h. Under Virgin Islands law, "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Ramos v. St. Croix Alumina, L.L.C., 277 F. Supp. 2d 600, 604 (D.V.I. 2003) (overruled on other grounds by Miller, 2005 WL 1353395, *5, n.2) (citation omitted). Allegations of discrimination alone are insufficient to support such a claim. Id. We conclude, as a matter of law, that the alleged conduct of the VIHA is not

extreme or outrageous, and Count VIII of the complaint alleging intentional infliction of emotional distress shall be dismissed.

Likewise, the VIHA contends that Speaks' claim in Count IX for negligent infliction of emotional distress should be dismissed under Rule 12(b)(6). To state a claim for negligent infliction of emotional distress under Virgin Islands law, a plaintiff must allege, inter alia, that she suffered some physical harm as a result of the defendant's conduct. Id. (citing Anderson v. Government of Virgin Islands, 180 F.R.D. 284, 286 (D.V.I. 1998); Restatement (Second) of Torts § 313). Speaks does not allege any such physical harm, and Count IX of her complaint will be dismissed against the VIHA.

VII.

Finally, we address Speaks' claim for punitive damages. She includes her claim for punitive damages both in Count X of the complaint and in a separate clause demanding judgment against the defendants and various types of damages. Insofar as Speaks includes her demand for punitive damages as a separate count in the complaint, it will be dismissed, as punitive damages cannot form a cause of action upon which a plaintiff would be entitled to relief. As we will dismiss each of Speaks' other nine claims, there is no need to address defendants' argument that they are immune from punitive damages.

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DIVISION OF ST. CROIX

DENISE SPEAKS	:	CIVIL ACTION
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v.	:	
	:	
GOVERNMENT OF THE VIRGIN ISLANDS, et al.	:	NO. 2006-168

ORDER

AND NOW this 14th day of January, 2009, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant Government of the Virgin Islands to dismiss is GRANTED with prejudice;

(2) the motion of defendant Virgin Islands Housing Authority to dismiss Counts I, II, III, IV, V, VI, VIII, IX and X is GRANTED with prejudice;

(3) the motion of defendant Virgin Islands Housing Authority to dismiss Count VII is GRANTED without prejudice and with leave to plaintiff Denise Speaks to file and serve an amended complaint with respect to the allegations in that count on or before January 30, 2009. See Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004); and

(4) Count VII against defendant Virgin Islands Housing Authority will be dismissed with prejudice if no amended complaint is filed and served by plaintiff on or before January 30, 2009.

BY THE COURT:

/s/ Harvey Bartle III
HARVEY BARTLE III C.J.
SITTING BY DESIGNATION